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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JAVIER MURRIETA et al., Petitioners and Appellants, v. CIVIL SERVICE COMMISSION, Respondent; COUNTY OF LOS ANGELES et al., Real Parties In Interest and Respondents.	B196072 (Los Angeles County Super. Ct. No. BS101942)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Yaffe, Judge. Affirmed.

Haney, Buchanan & Patterson LLP and Steven H. Haney for Petitioners and Appellants.

Hausman & Sosa, Jeffrey M. Hausman and Larry D. Stratton for Real Party In Interest and Respondent County of Los Angeles Fire Department.

Appellants Javier Murrieta ("J. Murrieta") and Michael Ponder ("Ponder") (collectively, "Appellants") were employed as fire captains by the Los Angeles County Fire Department (the "Department"). In October 2002, the Department suspended Ponder for 12 days and reduced J. Murrieta's rank to firefighter specialist based on allegations that they participated in an inappropriate discussion about another fire captain during a morning briefing with their subordinates and then attempted to interfere with the Department's ensuing investigation. Following a 16-day administrative hearing before the Los Angeles County Civil Service Commission (the "Commission"), the Commission sustained the reduction of J. Murrieta to firefighter specialist and reduced the suspension of Ponder from 12 to three days. J. Murrieta and Ponder thereafter filed a petition for writ of administrative mandate pursuant to Code of Civil Procedure section 1094.5. The trial court denied the petition, finding that the administrative decision to reduce J. Murrieta's rank and to suspend Ponder was supported by the weight of the evidence and was not an abuse of discretion by the Commission. For the reasons set forth below, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Department Investigation And Discipline

J. Murrieta and Ponder are each long-term employees of the Department. J. Murrieta became a fire captain in 1991 and Ponder was promoted to the position in 1997. As of July 2001, both were fire captains assigned to Fire Station 118. On July 26, 2001, J. Murrieta and Ponder conducted a morning briefing called a lineup for the crew members of Fire Station 118 who were on duty at the time. In addition to J. Murrieta and Ponder, the following seven individuals attended the lineup: (1) Firefighter Specialist Peter Murrieta ("P. Murrieta"),[1] (2) Firefighter Specialist Chet Hopkins ("Hopkins"), (3)Firefighter Paramedic David Munoz ("Munoz"), (4) Firefighter Paramedic John Lane

[1] P. Murrieta is the brother of Appellant J. Murrieta.

("Lane"), (5) Firefighter Paramedic Brian Davy ("Davy"), (6) Firefighter Kenneth Bush ("Bush"), and (7) Firefighter Steve Fowler ("Fowler"). After J. Murrieta and Ponder finished addressing official business, there was a discussion about the promotion of a firefighter, David Schwartz ("Schwartz"), to the position of fire captain at Fire Station 114, where he would be working with another fire captain, Fred Farley ("Farley"). A discussion about Farley then ensued. Witness accounts of what was said during the lineup about Farley and by whom varied significantly. However, it was alleged by the Department that both J. Murrieta and Ponder participated in the discussion about Farley during which demeaning or defamatory statements about the fire captain were made.

On July 27, 2001, the Department received an anonymous letter regarding the lineup. The letter indicated that Ponder, J. Murrieta, P. Murrieta, and Hopkins had made inappropriate comments about Farley in which Farley "was made to sound homosexual and seemingly harassing to probationary firefighters." The letter further stated that Farley was "said to be a very strange character" and that it was reported that Farley "runs around the fire station naked, along with many other antics that are apparently unique to [his] personality." Following its receipt of the anonymous letter, the Department issued Letters of Inquiry to each individual who attended the lineup. Based on the responses to the Letters of Inquiry, the Department decided to initiate an investigation into alleged inappropriate conduct at the lineup and thereafter notified Ponder, J. Murrieta, and P. Murrieta that they were subjects of a formal Department investigation.[2]

The investigation was conducted by Shelli Weekes ("Weekes") of the Department's Employee Relations Division and Battalion Chief Juan Gonzalez ("Gonzalez"). Weekes and Gonzalez held investigative interviews with each employee who attended the lineup, including J. Murrieta and Ponder. During the course of the investigation, additional allegations were raised that J. Murrieta and Ponder had attempted to interfere with the investigation by inappropriately discussing the matter with

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[2] Hopkins initially was also a subject of the investigation, and later received a written reprimand regarding his participation in the lineup discussion about Farley.

witnesses to the lineup and by retaliating against one witness, Munoz, when he returned from his investigative interview. On July 3, 2002, Weekes submitted her investigative report to Edward Thatcher, Chief of the Employee Relations Division, who in turn submitted the report to the Department's decision-maker for the matter, Deputy Fire Chief Gilbert Herrera ("Herrera").

On July 18, 2002, Herrera issued Notices of Intent to Ponder, J. Murrieta, and P. Murrieta. The notices set forth the Department's allegations of inappropriate conduct against each employee and indicated that the Department intended to reduce J. Murrieta's rank to firefighter specialist, to suspend Ponder for 12 days without pay, and to suspend P. Murrieta for nine days without pay. The notices also stated that the employees had a right to respond to the intended action by either submitting a written response and/or scheduling a meeting with Herrera. Herrera thereafter held individual *Skelly*[3] meetings with Ponder, J. Murrieta, and P. Murrieta. Following these meetings, Herrera decided to impose the proposed discipline. Ponder was issued an October 4, 2002 Notice of Suspension in which he was suspended for 12 days without pay. J. Murrieta was issued an October 15, 2002 Notice of Reduction in which his rank was reduced from fire captain to firefighter specialist.

The Notice of Reduction to J. Murrieta and Notice of Suspension to Ponder included the following common allegations about the July 26, 2001 lineup: (1) a fire captain was referred to as a "fag" or "faggot"; (2) a comment was made that a former firefighter specialist should "watch his tight butt" around the captain; and (3) Ponder told a story that the captain would harass probationary firefighters as they slept by standing over them wearing only his turnout coat and then slapping them on the face with a hot dog so that when they woke they would find the captain naked before them.

With respect to J. Murrieta, the Notice of Reduction also alleged the following: (1) there was a discussion during the lineup about differences in behavior specific to the

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[3] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 195 (*Skelly*).

fire captain; (2) J. Murrieta told a story during the lineup about the captain watching television in his underwear; (3) on October 28, 2001, three days before a witness's investigative interview, J. Murrieta called the witness to the back of the fire station and proceeded to make various statements regarding the investigation, including that J. Murrieta could lose his rank and had his family to consider; (4) on October 30, 2001, after another witness returned from his investigative interview, J. Murrieta commented to the witness that he had a lot to say and then counseled him about spray painting J. Murrieta's vehicle while denying the witness's request for union representation; and (5) on December 5, 2001, during his investigative interview, J. Murrieta was asked if he had approached anyone about the investigation and falsely denied that he had.

With respect to Ponder, the Notice of Suspension also alleged the following: (1) on August 17, 2001, Ponder told crew members who had received Letters of Inquiry that their responses would be completed together; (2) on or about August 15, 2001, Ponder told one witness that he was to inform Ponder that his response to the Letter of Inquiry was completed so that the response could be logged in before it was submitted to the battalion chief; (3) on October 30, 2001, Ponder retaliated against a witness who was returning from his investigative interview by allowing J. Murrieta to confront the witness about a spray painting incident and to deny the witness's request for union representation; and (4) on December 5, 2001, during his investigative interview, Ponder made a point to mention that one of his subordinates, who was also a witness, did not comply with instructions.[4]

Following the Department's imposition of discipline, J. Murrieta and Ponder filed an administrative appeal with the Commission.[5]

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[4] During the administrative proceedings, the parties stipulated that the charge that Ponder had commented during his investigative interview that a certain witness did not comply with instructions was not a basis for Ponder's discipline.

[5] P. Murrieta also filed an administrative appeal with the Commission regarding his nine-day suspension. However, he is not a party to the present appeal.

II. Administrative Appeal Before The Commission

Hearing Officer Walter Daugherty ("Daugherty") held a 16-day hearing on the administrative appeal, commencing on March 27, 2003, and concluding on June 16, 2005. Over the course of the proceedings, Daugherty heard the testimony of 24 witnesses and received into evidence 198 exhibits. On August 19, 2005, Daugherty issued a 57-page recommended decision that detailed his findings of fact and conclusions of law.

A. Factual Findings Regarding The July 26, 2001 Lineup

1. References To Farley's Sexual Orientation

In its disciplinary notices, the Department alleged that, during the July 26, 2001 lineup, there was a discussion about the sexual orientation of a fire captain in which the captain was referred to as a "fag" or "faggot." At the administrative hearing, seven of the nine individuals who were present at the lineup testified that no one used the term "fag" or "faggot" during the discussion about Farley or implied that Farley was a homosexual. Of the two remaining witnesses, Lane initially testified that Farley's sexual orientation was insinuated during the lineup, but later stated on cross-examination that such testimony was inaccurate. Munoz initially testified that Ponder, J. Murrieta, and P. Murrieta all referred to Farley as a "fag" or "faggot" during the lineup. On cross-examination, however, Munoz admitted that he could not specifically recall if either J. Murrieta or Ponder had used those terms in reference to Farley. In his administrative decision, Daugherty chose not to credit Munoz' inconsistent testimony on this issue, instead finding that Farley was not referred to as a "fag" or "faggot" during the lineup nor was his sexual orientation discussed.[6]

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[6] Throughout the administrative hearing, Appellants maintained that Munoz and Lane were biased against them because Munoz had been counseled by Appellants on numerous prior occasions about his conduct and because Lane was Munoz' paramedic partner and friend. In his administrative decision, Daugherty noted Appellants' evidence of alleged bias on the part of Munoz and Lane, but did not find it to be probative to his credibility determinations.

2. Comment That A Fire Captain Should "Watch His Tight Butt"

The Department also alleged that a comment was made during the lineup that a newly promoted fire captain should "watch his tight butt" around another captain. At the administrative hearing, eight of the nine individuals who were present at the lineup testified that no such statement was made. Munoz was the sole witness who testified that P. Murrieta said that Schwartz should "watch his tight butt" around Farley. In his administrative decision, Daugherty acknowledged that the statement may have been made, but found that because of inconsistencies in Munoz' testimony, the allegation could not be sustained.

3. Story About Farley's Conduct Toward Probationary Employees

The Department further alleged that a story was told during the lineup about a fire captain who would harass probationary firefighters as they slept by standing over them wearing only a turnout coat and then slapping them on the face with a hot dog. At the administrative hearing, Ponder, Fowler, and Davy each testified that no one made a comment about Farley or any other captain harassing probationary employees. Hopkins, on the other hand, testified that there was a discussion about Farley running around the fire station naked and harassing probationary firefighters, but he could not recall who participated in the discussion. Munoz initially testified that Ponder made a remark about Farley harassing probationary firefighters by standing naked over them with a hot dog in their face, but later stated that he could not specifically recall who relayed that story. Lane testified that Ponder described how Farley would tease firefighters by wearing only a coat and boots, tapping a firefighter on the shoulder with a hot dog, and then opening his coat so that the firefighter would believe he had been touched by Farley's penis. On cross-examination, Lane acknowledged that such comments were not made in reference to Farley harassing probationary employees. He maintained, however, that Ponder did tell that particular story about Farley during the lineup.

Both J. Murrieta and P. Murrieta denied that there was any discussion about Farley harassing probationary firefighters. However, they testified that comments were made about a different captain's conduct toward firefighters under his command. Although he

could not identify the speaker, P. Murrieta testified that someone told a story about a former fire captain named "Galiher" who would stand naked in a coat and then wake up firefighters with a hot dog in their face. J. Murrieta, on the other hand, testified that he told a story about how Captain Galiher, while seated behind his desk, would have a serious discussion with a firefighter newly assigned to his shift and then stand up at the end of the discussion to show that he was naked from the waist down. J. Murrieta indicated that he did not identify Captain Galiher by name or rank when he shared the story. He also testified that he told the story after the official lineup had ended as an example of behavior that was no longer acceptable under new Department policies.

In his administrative decision, Daugherty found that a story was told about Farley being naked in a turnout coat and then waking a sleeping firefighter by putting a hot dog in his face. He further found that Ponder was the person who told that story. With respect to J. Murrieta's admission that he told a story about a different captain being partially naked in discussions with new firefighters, Daugherty noted that because J. Murrieta did not identify that captain by name, it was likely that those who heard the story also connected it to Farley.

4. Other Statements About Farley's Dress And Demeanor

In its disciplinary notice to J. Murrieta, the Department also alleged that J. Murrieta had admitted that part of the discussion about the fire captain pertained to differences in his behavior and included a story about the captain watching television in his underwear. At the administrative hearing, most of the witnesses who were present at the lineup acknowledged that there was some discussion about Farley's dress or lack thereof. Munoz, Lane, Hopkins, and Fowler each testified that comments were made about Farley being either naked or partially dressed at the fire station. While Munoz attributed the comment to J. Murrieta, Lane claimed that it was Ponder who made a remark about Farley running around the station naked. Hopkins also reported that, during the lineup, he, J. Murrieta, and Ponder described how Farley would walk around the fire station wearing only shorts, a bearskin rug, and UGG boots. Fowler and P. Murrieta likewise recalled a reference to Farley wearing UGG boots. Additionally, Munoz,

Fowler, and P. Murrieta all testified that someone said Farley watched television in his underwear while at the fire station, and J. Murrieta admitted in his testimony that he made that statement. J. Murrieta denied, however, that there was any other discussion about Farley being partially dressed or naked, and Ponder denied being present during any discussion whatsoever about Farley's dress.

Many of the witnesses also testified that part of the discussion about Farley pertained to differences or peculiarities in his behavior. Munoz and Lane reported that comments were made about Farley being "weird" or engaging in unique and unusual behavior. Davy also recalled that there was some discussion about Farley being "different" or "weird," but he could not remember what specifically was said. Hopkins testified that Farley was described during the lineup as a "little bit different," a "different individual," and a "very unique individual." It was Hopkins' opinion, however, that the discussion about Farley was not derogatory, but was offered as a teaching tool so that other firefighters would be aware of Farley's peculiar behavior if they ever had to work with him. Fowler similarly testified that no one said anything inappropriate about Farley during the lineup, but he conceded that comments were made about the fire captain that were not flattering. Ponder, J. Murrieta, and P. Murrieta each denied that there was any discussion about Farley having a strange or different character. J. Murrieta did admit that "differences" were discussed with respect to Farley, but asserted that it was acceptable for a fire captain to discuss differences between personnel under Department policies promoting diversity.

In his administrative decision, Daugherty found that, by his own admission, J. Murrieta made a comment during the lineup that Farley watched television in his underwear. Daugherty further found that Farley was described during the lineup as "a little bit different," a "different individual," and a "very unique individual," and that there was a discussion about Farley wearing a bearskin rug and UGG boots while at the fire station.

5. Failure To Stop Inappropriate Statements About Farley

In addressing the culpability of J. Murrieta and Ponder at the lineup, Daugherty found that, as the two shift supervisors for the lineup, they had a duty to stop any derogatory discussion about a fellow fire captain. Daugherty further found that both J. Murrieta and Ponder violated Department policy by participating in a defaming and demeaning discussion about Farley and by failing to stop the inappropriate statements that others made about the captain. In so doing, Daugherty rejected J. Murrieta's claim that the comments about Farley were made during the "informal" part of the lineup after the official business had concluded. Daugherty also rejected Ponder's assertion that he was absent for much of the discussion about Farley because he repeatedly had to leave the lineup to answer the telephone.

B. Factual Findings Regarding Interference With The Investigation

1. Instructions On Responses To Letters Of Inquiry

In its disciplinary notice to Ponder, the Department alleged that Ponder attempted to interfere with the investigation by telling crew members who had received Letters of Inquiry that their responses would be completed together. On or about August 17, 2001, Battalion Chief Peter Sylchak delivered the Letters of Inquiry to crew members who had attended the lineup. Ponder, P. Murrieta, Fowler, and Lane were all present in the captain's office when they received their respective letters. The letters indicated that any discussion of the matter could be considered interference with an official Department inquiry and lead to disciplinary action.

At the administrative hearing, Lane testified that Ponder instructed those present in the captain's office to complete their responses to the Letters of Inquiry together and to do so with a union representative to ensure that their responses were consistent. Ponder, P. Murrieta, and Fowler, on the other hand, each denied that Ponder gave any such instruction. They also testified that they completed their responses on their own and did not discuss their responses with any other crew member. Lane likewise acknowledged that he never consulted with anyone in completing his response nor was he asked about the content of his response by Ponder or J. Murrieta. In his administrative decision,

Daugherty credited the testimony of Lane on this issue, finding that Ponder did instruct the three crew members who received their Letters of Inquiry on August 17, 2001, that their responses would be completed together. However, Daugherty also found that, after August 17, 2001, Ponder made no further effort to influence any responses to the Letters of Inquiry or to engage in any discussion about the Department's investigation.

The Department also alleged that, on August 15, 2001, Ponder told Munoz that he was to inform Ponder that his response to the Letter of Inquiry was completed so that the response could be logged in before it was submitted to the battalion chief. At the administrative hearing, however, both Munoz and Ponder denied that any such statement was made. Daugherty thus found that this allegation was not sustained.

2. J. Murrieta's October 28, 2001 Discussion With Lane

In its disciplinary notice to J. Murrieta, the Department alleged that, on October 28, 2001, three days before Lane's investigative interview, J. Murrieta called Lane to the back of the fire station and proceeded to make various statements regarding the investigation, including that J. Murrieta could lose his rank and had his family to consider. The Department further alleged that, during his December 5, 2001 investigative interview, J. Murrieta was asked if he had approached anyone about the investigation and falsely denied that he had.

At the administrative hearing, Lane and J. Murrieta testified at length about their October 28, 2001 discussion. According to Lane, J. Murrieta called him to the back of the fire station a few days before his investigative interview. As the two men conversed, J. Murrieta raised the subject of the pending investigation and made statements to the effect that it was a shame that employees could no longer joke around, that the allegations against him were a "third strike," and that he could lose his rank and had his family and retirement to consider. Lane believed that J. Murrieta was aware that Lane's interview responses could affect the investigation and that J. Murrieta was asking Lane to "do the right thing." However, Lane also acknowledged that earlier in the day, he had called J. Murrieta a "commie pinko bastard" during a conversation about the World Series, and that J. Murrieta counseled Lane about that comment as they spoke outside the fire station.

In his testimony, J. Murrieta stated that he called Lane to the back of the fire station in order to counsel him about the "commie pinko bastard" comment. According to J. Murrieta, Lane first raised the subject of the pending investigation and asked what sort of discipline could result from the investigation. J. Murrieta then explained progressive discipline. J. Murrieta denied that he expressed any concerns about the investigation or about losing his rank, but admitted that he told Lane that he had been "taken to task before" and had his family to consider. J. Murrieta also admitted telling Lane that he would have preferred that the pending investigation be handled informally.

In his administrative decision, Daugherty credited Lane's account of the discussion. Daugherty therefore found that J. Murrieta discussed the pending investigation with a subordinate employee in violation of the proscription set forth in his Letter of Inquiry, and in so doing, failed to exercise good judgment. Daugherty also found that, despite being advised that he had to make full, truthful statements during his investigative interview, J. Murrieta falsely denied that he had approached anyone regarding the investigation.

3. J. Murrieta's October 30, 2001 Counseling Of Munoz

The Department also alleged that both J. Murrieta and Ponder retaliated against Munoz shortly after he returned from his October 30, 2001 investigative interview by counseling Munoz about a prior spray painting incident and then denying his request for union representation. Munoz, J. Murrieta, and Ponder each testified about the October 30, 2001 incident during the administrative hearing.

According to Munoz, upon returning to the fire station from his investigative interview, he walked by J. Murrieta who commented, "Oh, I bet you had a lot to say." Munoz then went to the captain's office to notify Ponder of his return. While Ponder and Munoz were speaking in the captain's office, J. Murrieta came in and instructed Munoz in an angry tone to sit down. J. Murrieta then asked Munoz if he had spray painted someone's private vehicle in the station parking lot. When Munoz admitted that he had, J. Murrieta stated that such conduct was vandalism and that Munoz had also spray

painted J. Murrieta's vehicle in the process.[7] Munoz responded that he did not feel comfortable discussing the matter and wanted to call the union. As Munoz began to leave the captain's office, J. Murrieta accused Munoz of being insubordinate and told him to "sit his ass down." Munoz continued to leave, however, and thereafter called both the battalion chief and the union.

J. Murrieta and Ponder were largely consistent in their testimony about the counseling of Munoz. According to J. Murrieta, on October 28, 2001, he learned that Munoz had spray painted firefighter Kevin Furlong's private vehicle and that some of the paint had landed on J. Murrieta's nearby car. J. Murrieta discussed the matter with Captain Gary Black that day and informed Captain Black of his intent to counsel Munoz. As of October 30, 2001, J. Murrieta was aware that he was the subject of a Department investigation and that Munoz was being interviewed that day as part of the investigation. However, he believed it was still appropriate to counsel Munoz at that time. Upon Munoz' return from his lengthy investigative interview, J. Murrieta remarked to Munoz that he "had a lot to say." He later joined Munoz and Ponder in the captain's office and asked about the spray painting incident. When Munoz indicated that the incident had been resolved, J. Murrieta responded that it had not been because some of the paint had landed on his vehicle. Munoz then stated that he did not want to talk about the matter and wanted union representation. As Munoz headed toward the door, J. Murrieta told him to sit down and that it would be insubordination if he left. However, J. Murrieta did not attempt to physically restrain Munoz from leaving or to prevent him from calling the union, which Munoz later did.

In his administrative decision, Daugherty found that J. Murrieta retaliated against Munoz and failed to exercise good judgment when he confronted Munoz about the spray painting incident and refused Munoz' request for a union representative. However,

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[7] Munoz testified that he and some coworkers had spray painted firefighter Kevin Furlong's vehicle on his last day at Fire Station 118 as a practical joke, and that they later cleaned the vehicle.

with respect to Ponder, Daugherty found that because Ponder was a passive observer during the counseling of Munoz, Ponder did not retaliate against Munoz or impermissibly deny him union representation.

C. Conclusions Of Law And Recommended Discipline

Throughout the administrative proceedings, Appellants argued that the Department's investigation was in retaliation for their various protected activities and that their discipline reflected disparate treatment. In his administrative decision, Daugherty rejected these arguments. He specifically concluded that J. Murrieta and Ponder failed to meet their burden of proving retaliation or disparate treatment, and found that the manner in which the Department conducted its investigation did not comprise a basis to modify Appellants' discipline.

With respect to J. Murrieta's discipline, Daugherty concluded that a reduction from fire captain to firefighter specialist was appropriate based on the proven allegations. Daugherty noted that J. Murrieta had received a six-day suspension in April 1995 for falsifying official records and instructing his crew to assist him in that regard, and had received a 30-day suspension in December 1996 for using a racial epithet before his crew in reference to an African-American battalion chief. Daugherty also noted that J. Murrieta should be held to a higher standard of behavior as a supervisory employee, and that the sustained allegations manifested serious misconduct that rendered him unsuitable to continue as a supervisor. Daugherty recommended that J. Murrieta's reduction in rank be sustained.

With respect to Ponder's discipline, Daugherty concluded that a 12-day suspension was excessive based on the proven allegations. Daugherty noted that Ponder had no record of prior discipline. He also noted that the sole sustained allegations against Ponder were that he told a story during the lineup about Farley harassing probationary employees and later instructed certain crew members that their responses to the Letters of Inquiry would be completed together. Daugherty concluded that, while such actions were improper and subject to discipline, they did not warrant the 12-day suspension imposed

by the Department. Daugherty recommended that Ponder's 12-day suspension be reduced to three days.

D. Final Decision Of The Commission

On November 20, 2005, the Commission adopted the findings and recommendations of Daugherty as its final decision. The Commission accordingly sustained the reduction of J. Murrieta from fire captain to firefighter specialist and reduced the suspension of Ponder from 12 to three days.[8]

III. Writ Petition Before The Trial Court

On February 24, 2006, J. Murrieta and Ponder filed a petition for writ of administrative mandate in Los Angeles County Superior Court. They sought to challenge the Commission's decision on the grounds that it was based on charges that were not set forth in their respective notices of discipline, and that it was not supported by the weight of the evidence. On October 24, 2006, the trial court heard the matter and denied the writ petition.

In its Minute Order, the trial court stated that its "independent examination of the administrative record does not convince it that the administrative determination is wrong." The court found that while "the witnesses at the line up did not agree as to exactly what was said, or who said it, . . the clear sense of the conversation was that Captain Farley was a homosexual and that he exhibited his genitalia to other personnel at the station." The court also rejected Appellants' argument that the Commission relied on uncharged conduct in reaching its decision, instead finding that the hearing officer did not consider such conduct as the basis for his recommended discipline. The court therefore upheld the Commission's decision to reduce J. Murrieta's rank to firefighter specialist and to suspend Ponder for three days. On January 8, 2007, J. Murrieta and Ponder each filed a timely notice of appeal.

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[8] The Commission also adopted Daugherty's recommendation that P. Murrieta's discipline be reduced from a nine-day suspension to a letter of reprimand.

DISCUSSION

I. Standard Of Review

The parties first dispute the proper standard of review to be applied to this appeal. While the Department argues that the substantial evidence test applies, Appellants assert that de novo review is required. We accordingly begin by addressing the applicable standard of review for both the trial and appellate courts.

With respect to the trial court, the standard of review in a mandamus proceeding depends on the nature of the right at issue. Where a fundamental vested right is involved, the trial court must conduct an independent review of the record to determine whether the administrative agency's findings are supported by the weight of the evidence. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) In all other cases, the trial court's review is limited to determining whether the administrative decision is supported by substantial evidence. (*Strumsky v. San Diego County Employees Retirement Assn.*, *supra*, at p. 32; *Bixby v. Pierno*, *supra*, at p. 144.) It has been held that discipline imposed on public employees affects their fundamental vested right in their employment. (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 52; *McMillen v. Civil Service Com.* (1992) 6 Cal.App.4th 125, 129.) Because a fundamental vested right was at issue in this case, the trial court was required to exercise its independent judgment on the evidence.

In exercising its independent judgment, the trial court examines the entire administrative record and reviews the evidence both in support of, and in conflict with, the agency's findings. (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45.) The trial court also resolves conflicts in the evidence and assesses the credibility of witnesses to arrive at its own independent findings of fact. (*Ibid*.) Even where it exercises its independent judgment, however, the trial court still must afford a strong presumption of correctness to the administrative findings. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817). The complaining party bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. (*Ibid*.)

After the trial court has rendered its decision, a different standard of review applies to the appellate court. In cases where the trial court has exercised its independent judgment on the evidence, the appellate court reviews the record to determine whether the trial court's findings are supported by substantial evidence. (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 824; *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 218.) "'Evidence is substantial if any reasonable trier of fact could have considered it reasonable, credible, and of solid value.' [Citations.]" (*Kazensky v. City of Merced*, *supra*, 65 Cal.App.4th at pp. 52-53.) In making that determination, we must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. (*Valiyee v. Department of Motor Vehicles* (1999) 74 Cal.App.4th 1026, 1031; *Kazensky v. City of Merced*, *supra*, at p. 52.) "Where the evidence supports more than one inference, we may not substitute our view of the evidence for the trial court's, and may overturn the trial court's findings of fact only if the evidence is insufficient to support those findings as a matter of law. [Citation.]" (*Valiyee v. Department of Motor Vehicles*, *supra*, at p. 1031.) Pure questions of law, on the other hand, are subject to a de novo standard of review. (*Lomeli v. Department of Corrections* (2003) 108 Cal.App.4th 788, 794; *Anserv Ins. Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 204.)

With respect to the level of discipline, judicial review of an administrative agency's assessment of a penalty is limited. The penalty selected by an agency will not be disturbed in a mandamus proceeding unless "'there is an arbitrary, capricious or patently abusive exercise of discretion by the administrative agency.' [Citation.]" (*Kazensky v. City of Merced*, *supra*, 65 Cal.App.4th at p. 54.) "Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. [Citation.]" (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.) In reviewing a penalty, the appellate court gives no deference to the trial court's determination of the issue, but rather reviews the agency's selection of the penalty for an abuse of discretion. (*Cummings v. Civil Service Com.* (1995) 40 Cal.App.4th 1643, 1652; *Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d

210, 227.) If reasonable minds may differ as to the propriety of the discipline imposed, then no abuse of discretion by the agency is shown. (*Deegan v. City of Mountain View*, *supra*, 72 Cal.App.4th at pp. 46-47.)

II. The Trial Court Applied The Proper Standard Of Review

Appellants contend that the trial court applied the incorrect standard of review to their petition based on the court's reference to a Government Code provision in its Minute Order. In its Minute Order, the trial court began by stating that it was exercising its independent judgment on the evidence. It then added that it must "'afford a strong presumption of correctness concerning the administrative findings,'" and that this "admonition has been declared by the legislature to be particularly applicable to determinations based substantially upon the relative credibility of witnesses. See Government Code section 11425(b)." Appellants do not dispute that the independent judgment test was proper, but instead assert that the trial court misapplied Government Code section 11425.50, subdivision (b).[9]

Section 11425.50 is part of the Administrative Procedure Act. It provides, in pertinent part, that if the factual basis for an administrative decision "includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it." (§ 11425.50, subd. (b).) Appellants claim that the trial court erred in applying section 11425.50's presumption of correctness to the administrative decision because the Commission's findings were based substantially on the credibility of witnesses, but the findings did not identify the observed demeanor, manner or attitude of those witnesses. The Department, on the other hand,

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[9] Unless otherwise stated, all further statutory references are to the Government Code.

argues that there was no error because the statute applies only to state agencies and not to local agencies like the County of Los Angeles.

The Department is correct that section 11425.50 did not apply to Appellants' administrative appeal before the Commission. Section 11425.50 is contained in Chapter 4.5 of the Administrative Procedure Act. (§ 11370 ["Chapter 4.5 . . . constitute[s], and may be cited as, the Administrative Procedure Act."].) The provisions of Chapter 4.5, however, generally apply solely to agencies of the state. (§§ 11410.20, 11410.30.) Except to the extent made applicable by statute, Chapter 4.5 does not apply to any local agencies, including a county agency such as the Commission. (§ 11410.30, subd. (b) [Chapter 4.5 "does not apply to a local agency except to the extent the provisions are made applicable by statute."]; see also *Allen v. Humboldt County Board of Supervisors* (1963) 220 Cal.App.2d 877, 883 ["The Administrative Procedure Act applies only to those state agencies enumerated therein and does not apply to local agencies."].)

Because section 11425.50 does not apply to rulings by the Commission, there was no requirement that the administrative decision identify the observed demeanor, manner or attitude of the relevant witnesses. This also means that the trial court incorrectly cited to section 11425.50 in articulating the standard of review. However, when read as a whole, the Minute Order makes clear that the trial court did apply the proper standard of review to the mandamus proceeding. In setting forth the standard of review, the court correctly stated that it must "exercise[] its independent judgment as to the weight of the evidence." The court also correctly stated that it must "afford a strong presumption of correctness concerning the administrative findings." This presumption of correctness applied to the trial court's review of the administrative decision notwithstanding the inapplicability of section 11425.50. As the Supreme Court explained in *Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 696, the independent judgment test "'does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort.'" Rather, the superior court must "begin its review with a presumption of the correctness of administrative findings, and then, after affording the respect due to these findings, exercise independent judgment in making its own

findings." (*Id*. at p. 701.) The Minute Order reflects that the trial court did afford a presumption of correctness to the administrative decision and also exercised its independent judgment on the evidence. It thus applied the proper standard of review to Appellants' writ petition.

III. The Trial Court's Findings Are Supported By Substantial Evidence

Appellants also challenge the findings of fact made by the trial court. They maintain that the weight of the evidence failed to establish that they engaged in any misconduct at the July 26, 2001 lineup or attempted to interfere with the Department's ensuing investigation. We conclude, however, that substantial evidence supports the trial court's findings.[10]

A. Discussion About Farley's Sexual Orientation

Appellants argue that the trial court erred in finding that Farley's sexual orientation was discussed at the lineup because the Commission found that it was not. They reason that the Commission's contrary finding on this charge shows the trial court failed to afford a strong presumption of correctness to the administrative decision. Appellants' argument lacks merit. Although the trial court was required to begin its review with a presumption of correctness in the administrative findings, it was not bound by those findings, but instead had a duty to exercise its independent judgment on the evidence. (*Strumsky v. San Diego County Employees Retirement Assn.*, *supra*, 11 Cal.3d at p. 32; *Bixby v. Pierno*, *supra*, 4 Cal.3d at p. 143.) In conducting its independent review, the trial court found that while "the witnesses at the line up did not agree as to exactly what was said, or who said it, . . the clear sense of the conversation was that Captain Farley was a homosexual." Substantial evidence supports this finding.

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[10] Appellants insist that we must review the trial court's factual findings de novo because the court failed to exercise its independent judgment on the evidence. However, as discussed above, the trial court did apply the proper standard of review to Appellants' petition and we must affirm the court's findings if supported by substantial evidence. (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 824.) Contrary to Appellants' claim, the trial court's findings of fact are not subject to a de novo standard of review.

At the administrative hearing, one witness, Munoz, testified that Farley was referred to as a "fag" or "faggot" during the lineup, though he could not recall if J. Murrieta and Ponder in particular had used those terms. While Daugherty chose not to credit Munoz' testimony on this issue, the trial court was free to independently weigh the credibility of the witnesses and to reach a contrary finding. Moreover, multiple witnesses testified that a story was told about a captain teasing sleeping firefighters by standing over them while partially naked and then waking them up with a hot dog in their face. J. Murrieta himself admitted that, during the discussion about Farley, he told a story about an unidentified captain who would have meetings with newly assigned firefighters while seated behind his desk and then stand up to reveal that he was naked from the waist down. In addition to these stories, a number of witnesses recalled that Farley was described during the lineup as "different," "unique," or "weird," and that there was laughter among the crew during the discussion about Farley.

Therefore, while Farley's sexual orientation may not have been explicitly discussed at the lineup, the trial court could draw the reasonable inference that the "sense of the conversation" pertained to Farley's alleged homosexuality. Unlike the trial court, we do not consider issues of witness credibility nor do we determine whether contrary inferences may be drawn from the evidence.

B. Discussion About Farley Exhibiting His Genitalia

Appellants claim that the trial court erred in failing to make any specific finding as to whether a story was told about Farley harassing probationary firefighters by putting a hot dog in their face. They further assert that any such finding is not supported by the evidence. While Appellants are correct that the trial court did not specifically reference the alleged "hot dog" story in its Minute Order, the court did find that the "sense of the conversation" was that Farley "exhibited his genitalia to other personnel at the station." We conclude that this finding also is supported by substantial evidence.

Contrary to Appellants' argument, a number of witnesses at the administrative hearing provided testimony that corroborated this allegation. To begin with, multiple witnesses testified that comments were made about Farley being partially dressed or

naked while at the fire station. Munoz and Hopkins also recalled that there was some discussion about Farley running around naked and harassing probationary employees, although they could not identify who made those specific statements. Lane testified that Ponder told a story about how Farley would tease firefighters by tapping them on the shoulder with a hot dog and then opening his coat when they turned around to reveal that he was naked. On cross-examination, Lane conceded that this story was not told as an example of Farley harassing probationary employees. However, he never retracted his testimony that Ponder relayed this particular story about Farley during the lineup. Additionally, J. Murrieta admitted that he told a different story about a captain who would stand up from his desk at the end of a discussion with a newly assigned firefighter to reveal that he was naked from the waist down. Although J. Murrieta asserted that this story pertained to a different captain, those present at the lineup could have connected it to Farley given that the captain never was identified by name. Thus, while witness accounts of what was said during the lineup diverged in many respects, substantial evidence supports the finding that there was at least some discussion about Farley allegedly exhibiting his genitalia to others at the fire station.

C. Ponder's Instruction Regarding Responses To Letters Of Inquiry

Ponder also challenges the trial court's failure to make a specific factual finding that he instructed subordinates to complete their responses to the Letters of Inquiry together. He further contends that this finding is not supported by the evidence. It is true that the trial court did not address in its Minute Order each specific finding of fact set forth in the administrative decision. However, the trial court did state that its "independent examination of the administrative record does not convince it that the administrative determination is wrong," and that "the weight of the evidence contained in the administrative record supports the administrative decision to discipline [Appellants]." Accordingly, there was an implied finding by the trial court that the sustained charges against Ponder were supported by the weight of the evidence, including the charge concerning Ponder's instruction on the Letters of Inquiry. Substantial evidence supports the trial court's implied finding on this issue.

At the administrative hearing, Lane testified that Ponder instructed those present in the captain's office to complete their responses to the Letters of Inquiry together and to do so with a union representative to ensure that their responses were consistent. Although the three other individuals who were present at the time testified that no such instruction was given, the trial court was entitled to find that Lane was more credible in his testimony, as did the Commission. In reviewing this finding, it is not our role to re-weigh the credibility of witnesses. Rather, we must resolve all evidentiary conflicts in favor of the trial court's decision and sustain every factual finding, like this one, that is supported by substantial evidence. (*Valiyee v. Department of Motor Vehicles*, *supra*, 74 Cal.App.4th at p. 1031; *Kazensky v. City of Merced*, *supra*, 65 Cal.App.4th at p. 52.)

D. J. Murrieta's Interference With The Investigation

With respect to J. Murrieta's alleged interference with the investigation, the trial court specifically sustained the administrative findings that J. Murrieta improperly discussed the investigation with Lane prior to his investigative interview and retaliated against Munoz shortly after he returned from his interview. These findings also are supported by substantial evidence.

At the administrative hearing, Lane testified that J. Murrieta approached him a few days before his investigative interview and proceeded to make various statements about the pending investigation, including that J. Murrieta could lose his rank and had his family to consider. Munoz in turn testified that when he returned from his interview, J. Murrieta first commented that he had a lot to say and then counseled Munoz about a prior spray painting incident while denying his request for a union representative. J. Murrieta's account of these encounters differed in certain respects, but he essentially confirmed that he engaged in some discussion with Lane about the investigation a few days before Lane's interview and that he counseled Munoz about the spray painting incident shortly after Munoz' return from his interview. J. Murrieta denied any intent to impede the investigation or to intimidate witnesses by discussing these matters with his subordinates. However, given the timing of these incidents in relation to the investigative

interviews, there was substantial evidence to support the finding that J. Murrieta's actions constituted interference with an official Department investigation.

IV. J. Murrieta Has Failed To Demonstrate A Denial Of Due Process

A. Due Process At the Administrative Hearing

J. Murrieta contends that he was denied procedural due process at the administrative hearing before the Commission. In particular, he asserts that Hearing Officer Daugherty violated his due process rights by considering a charge regarding an "UGG boots" comment that was not included in the Notice of Reduction issued by the Department. We disagree.

In his administrative decision, Daugherty made 25 findings of fact regarding the Department's allegations against J. Murrieta. One such finding stated that "Captain Farley was also described as 'a little bit different,' 'a different individual' and a 'very unique individual' and he was described as wearing a bear skin rug and 'ugg' boots in the station house." Elsewhere in the decision, Daugherty explained that one witness, Hopkins, had testified that there was a discussion about Farley wearing UGG boots while at the fire station. Daugherty noted that "Hopkins said the references to the 'ugg' boots were in the context of a discussion about peculiar behavior by Captain Farley" in which Farley was described as "a 'little bit different,' a 'different individual' and a 'very unique individual.'" The administrative decision thus makes clear that Daugherty's reference to the "UGG boots" comment simply was provided as background evidence to support his finding that part of the discussion about Farley pertained to alleged differences or peculiarities in his behavior.

While J. Murrieta argues that he had no notice of any such charge, his Notice of Reduction specifically alleged that, during the discussion about Farley, "part of the conversation involved differences in behavior specific to that Captain." As a result, J. Murrieta did have adequate notice of, and an opportunity to respond to, the allegation that differences or peculiarities in Farley's behavior were discussed. Moreover, contrary to J. Murrieta's claim, there is no evidence that the UGG boots comment itself was a basis for imposing discipline. Rather, Daugherty found that discipline for the lineup discussion

was warranted because J. Murrieta permitted and participated in an inappropriate conversation about a fellow fire captain. The references to Farley's alleged differences or peculiarities in behavior supported the finding that the discussion about the fire captain was in fact derogatory and that discipline for failing to stop the discussion was warranted.

B. Due Process At The "*Skelly* Hearing"

J. Murrieta also asserts that he was denied procedural due process at the pre-disciplinary "*Skelly* hearing" before Deputy Fire Chief Herrera. (See *Skelly v. State Personnel Bd.*, *supra*, 15 Cal.3d at p. 215) [holding that an agency considering disciplinary action against a public employee must afford the employee certain procedural safeguards, including notice of the charges and a right to respond].) Specifically, J. Murrieta argues that he was denied an impartial *Skelly* hearing officer because Herrera was biased and acted as both the decision-maker in the Department's investigation and the hearing officer at the *Skelly* hearing. J. Murrieta also alleges that he was denied all the materials supporting the proposed discipline in the Department's Notice of Intent. The Department, on the other hand, insists that the issue of an alleged *Skelly* violation was never certified by the Commission in the administrative proceedings, and hence, that the argument was been waived on appeal.

The record reflects that the Commission limited its review of Appellants' administrative appeal to whether the allegations contained in the Department's disciplinary notices were true, and if so, whether the discipline imposed was appropriate. The Commission did not address the specific issue of whether there was a *Skelly* violation in the Department's selection of Herrera as the pre-disciplinary *Skelly* hearing officer, or in its selection of the supporting materials to include with the Notices of Intent. The Commission did consider Appellants' argument that the administrative investigation conducted by Weekes and Gonzalez was biased and retaliatory, but it did so in connection with Appellants' claim that evidence of bias in the investigation showed that the underlying charges against Appellants were untrue. The Commission ultimately rejected that argument, finding that Appellants had failed to prove that the Department's investigation was for retaliatory or discriminatory reasons. The specific *Skelly* violations

now alleged by J. Murrieta, on the other hand, were not considered by the Commission in its administrative decision. (See *Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 104 ["'It is fundamental that the review of administrative proceedings provided by section 1094.5 of the Code of Civil Procedure is confined to the *issues* appearing in the record of that body as made out by the parties to the proceedings, though additional *evidence*, in a proper case, may be received.'"].)

Even assuming that these due process issues were properly raised before the Commission, we conclude that such claims are without merit. With respect to Herrera serving as the *Skelly* hearing officer, it has been held that due process under *Skelly* does not prohibit an official from acting both as the decision-maker with respect to the proposed discipline and as the hearing officer at the subsequent *Skelly* hearing. (See *Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 282-283 (*Flippin*) [no due process violation where the official who initiated disciplinary action against an employee later presided over that employee's *Skelly* hearing].) As our colleagues in Division Two noted in *Flippin*, "[t]here is no authority that precludes an officer from performing such a dual function." (*Id*. at p. 281.) As for Herrera's alleged bias, J. Murrieta claims that Herrera could not properly serve as the *Skelly* hearing officer primarily because he denied a 1995 grievance filed by J. Murrieta on a minor unrelated matter which J. Murrieta then successfully arbitrated.[11] These allegations of bias on the part of Herrera, however, are purely speculative, particularly in light of Herrera's limited involvement in J. Murrieta's prior grievances and the lack of temporal proximity between such matters and the present discipline.

With respect to the materials that were included in the Notice of Intent, J. Murrieta likewise has failed to demonstrate a denial of due process. He insists that an undisclosed

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[11] In his 1995 grievance, J. Murrieta alleged that a battalion chief had made certain false entries about him in a business journal. The arbitration award precluded the chief from making any future journal entries pertaining to J. Murrieta without management approval.

document entitled "Response To Issues Raised In Skellies" was considered by Herrera in deciding to impose discipline and contained two new allegations that J. Murrieta had asked Munoz why he was "acting like a bitch" and told him to "check his locker because his dick might be in it." However, it is undisputed that this document was prepared by Weekes after J. Murrieta's *Skelly* hearing so it could not have been included with the Notice of Intent issued prior to that hearing. Moreover, there is no evidence that J. Murrieta's reduction in rank was based on these two additional allegations. The allegations were not referenced in the Department's Notice of Reduction nor were they considered by the Commission in its decision to impose discipline.

V. Appellants Have Failed To Demonstrate A Violation Of The Alleged Discrimination Complaint Process

Appellants contend that the Commission and the trial court erred in concluding that the Los Angeles County Discrimination Complaint Process did not apply to the Department's investigation of Appellants. According to Appellants, Los Angeles County has a written policy entitled the "Discrimination Complaint Process" which requires it to conduct fair and impartial investigations of internal complaints of discrimination or retaliation. They claim that the Department violated this written policy because the administrative investigation conducted by Weekes and Gonzalez was biased and retaliatory.

We are unable to address the merits of Appellants' argument, however, because the alleged written policy was not included in the administrative record lodged on appeal. Based on our review of the oral testimony offered at the administrative hearing, it does appear that a document entitled "Discrimination Complaint Process" was received into evidence as Appellants' Exhibit No. 107. The administrative record before us, however, consists of 16 volumes of reporter's transcripts, Department's Exhibits Nos. 1 through 73, and Appellants' Exhibits Nos. 1 through 106. It does not include Appellants' Exhibit No. 107. It is well-settled that the party seeking to challenge an order on appeal bears the burden of providing an adequate record for review. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) Failure to provide an adequate record on an issue requires that the

issue be resolved against the complaining party. (*Ibid*; *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) Because the "Discrimination Complaint Process" is not properly before this Court, we cannot determine whether the Commission or trial court erred in concluding that the document was inapplicable to the Department's investigation.

We note, however, that while the Commission declined to apply the "Discrimination Complaint Process" to the Department's investigation, it did consider Appellants' argument that the investigation was biased and retaliatory. The Commission concluded that it was not, and the trial court upheld the administrative decision. We likewise agree that Appellants' allegations of bias by Weekes, Herrera, and other Department officials involved in the investigation are wholly speculative. Moreover, irrespective of any alleged deficiencies in the Department's investigation, each allegation made against Appellants was reviewed by a neutral hearing examiner over the course of a 16-day civil service hearing. While the Commission did not sustain all of the Department's charges, it found that many of the allegations were proven and manifested serious misconduct by Appellants. The trial court ultimately upheld these findings, and as discussed above, the trial court's decision is supported by substantial evidence. In light of the sustained allegations of misconduct, we agree with the Commission and the trial court that the manner in which the Department conducted its administrative investigation did not comprise a basis to modify Appellants' discipline.

VI. The Commission's Penalty Decision Was Not An Abuse Of Discretion

As previously discussed, the propriety of a penalty imposed by an administrative agency rests in the sound discretion of the agency. (*Barber v. State Personnel Bd.*, *supra*, 18 Cal.3d at p. 404.) Its decision will not be disturbed on appeal unless there has been a manifest abuse of discretion. (*Deegan v. City of Mountain View*, *supra*, 72 Cal.App.4th at pp. 46-47; *Kazensky v. City of Merced*, *supra*, 65 Cal.App.4th at pp. 53-54.) No such abuse of discretion has been shown here.

With respect to J. Murrieta, the Commission found that he engaged in serious misconduct that implicated his status as a supervisory employee. Such conduct included permitting and participating in a derogatory discussion about a fellow fire captain, improperly discussing the Department's investigation with one subordinate, Lane, shortly before his investigative interview, and retaliating against another subordinate, Munoz, after his return from his interview. The Commission also found that J. Murrieta had received two prior disciplinary suspensions for falsifying official records and for using a racial epithet in reference to an African-American battalion chief. Given the seriousness of the sustained charges and the history of prior discipline, the Commission did not abuse its discretion in concluding that J. Murrieta's conduct rendered him unsuitable to continue as a supervisor and that a reduction in rank was appropriate.

With respect to Ponder, the Commission found that the sole sustained charges were that Ponder told a story during the lineup about Farley harassing probationary firefighters with a hot dog and later instructed certain crew members that their responses to the Letters of Inquiry would be completed together. The Commission also found that Ponder had no record of prior discipline. Based on such findings, the Commission decided that a disciplinary suspension was appropriate, but should be reduced from 12 to three days. We agree. While not all of the allegations against Ponder were proven, the Commission reasonably could conclude that the two sustained charges warranted a suspension because they demonstrated inappropriate conduct by Ponder in his capacity as a supervisor. The Commission did not abuse its discretion in imposing a three-day suspension.

Appellants argue that their discipline reflected disparate treatment because other Department employees were not disciplined for engaging in similar misconduct. They cite to an incident in which a firefighter named Gonzalo Salgado ("Salgado") complained that his captain referred to another firefighter as gay and then retaliated against Salgado for reporting the complaint. Following an investigation by the Department, the captain was not disciplined. However, Appellants have failed to show that the Salgado incident was sufficiently comparable to their case given that the results of that investigation and

the basis for the Department's decision were not addressed in any detail at Appellants' administrative hearing. Even assuming the case was similar in nature to Appellants' misconduct, "[w]hen it comes to a public agency's imposition of discipline, 'there is no requirement that charges similar in nature must result in identical penalties.' [Citations]" (*Talmo v. Civil Service Com., supra*, 231 Cal.App.3d at pp. 230-231; see also *Marino v. City of Los Angeles* (1973) 34 Cal.App.3d 461, 466 [no requirement that public agency "deal with all cases at all times in the same manner as it had dealt with some past cases that might seem comparable"].) In sum, the Commission acted within its discretion in reducing J. Murrieta's rank to firefighter specialist and in suspending Ponder for three days.

DISPOSITION

The judgment is affirmed. The Department shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.